Filed May 3, 1991 at
4:19 p.m.
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

In re:	)	
	)	
DONALD E. AUSTIN,	)	
	)	
debtor-in-possession,	)	
	)	
	)	Misc. 491-08
	)	
	)	
DONALD E. AUSTIN,	)	
	)	
plaintiff,	)	
	)	
v.	)	
	)	
SIGNET COMMERCIAL CREDIT CORPORATION,	)	
	)	
defendant	)	

O R D E R

The debtor/plaintiff in this adversary proceeding, Donald E. Austin, has moved that Bankruptcy Judge John S. Dalis be disqualified from presiding over any of the related bankruptcy cases involving the debtor. To resolve this motion, the Court must examine the contours of 28 U.S.C. § 455 (1988). Superimposing Austin's motion against the relevant standards convinces the Court that the motion must be DENIED. In addition, the Court decides that Austin should be sanctioned for pursuing this motion, and

orders that he pay the costs of defending against the motion. Finally, the Court orders a show cause hearing to determine whether Austin should be suspended from membership to the bar of this Court.

BACKGROUND

This particular proceeding is an outgrowth of several related bankruptcy cases that began six years ago. Austin is the principal of both Diamond Manufacturing Company ("Diamond") and Rose Marine, Inc. ("Rose"), both of which are in bankruptcy. Originally, Judge Coolidge of the Bankruptcy Court presided over the cases, but when Judge Coolidge retired in late 1987, Judge Dalis took over the case. The present motion arises out of an adversary proceeding that Austin filed in spring 1990. In that proceeding, Austin sought equitable subordination of the claims that defendant/creditor Signet Commercial Credit Corporation ("Signet") had against Austin, Diamond, and Rose.

A discovery skirmish in that case led Signet and Austin to a hearing on November 6, 1990, before Judge Dalis. At some point during the hearing, Austin raised questions concerning Judge Dalis's impartiality, and Judge Dalis treated Austin's concerns as an oral motion for disqualification. On December 10, Judge Dalis denied Austin's motion, but upon Austin's motion for reconsideration, vacated the order precisely one month later. Throughout these related proceedings Austin continually has

complained that Signet, its witnesses, and its attorneys have performed innumerable acts of fraud, perjury, and other tortious conduct. In his January 10 order, Judge Dalis observed that Austin now levelled the same charges at both him and the other federal bankruptcy judge in this district, Judge Davis. Judge Dalis wrote:

> Mr. Austin's motion for reconsideration raises allegations beyond those originally raised by him at hearing November 1, 1990, and beyond the considerations for disqualification under §455.[1]

Judge Dalis therefore recommended that this Court revoke reference of the motion to disqualify from the Bankruptcy Court, and he permitted Austin to file a motion "setting forth the grounds and facts Mr. Austin contends requires disqualification of me in this matter . . . ."[2] In response, Austin filed a 41-page motion containing 107 numbered paragraphs of allegations that Austin feels are relevant to the motion to disqualify. He also filed a two-page "brief" containing no citations to authority supportive of his position. The motion alleges various acts, omissions, and representations that Austin says show that Signet, its attorneys, its witnesses, and Judges Dalis and Davis committed fraud, perjury,

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[1] Order, Chap. 11 Case No. 85-40636, Adversary Proceeding No. 90-4041, slip op. at 1-2 (Bankr. S.D. Ga. Jan. 10, 1991).

[2] Id. at 3.

and other tortious acts against Austin. Austin also intimates that these parties violated federal racketeering law.

This Court agreed with the Bankruptcy Court that, given the gravity of these allegations, it should withdraw reference of the determination of this motion from the Bankruptcy Court. Before the Court attempts to evaluate Austin's arguments and claims, it is helpful to set forth, in some detail, the standard the Court must apply.

ANALYSIS

At the outset, the Court notes that Austin has stated that his motion is made pursuant to both 28 U.S.C. § 144 (1988) and 28 U.S.C. § 455 (1988). As Signet points out, however, section 144 does not apply to bankruptcy judges. E.g., In re Norton, 119 B.R. 332, 334 (Bankr. N.D. Ga. 1990); In re Lieb, 112 B.R. 830, 833 n.1 (Bankr. W.D. Tex. 1990); In re B & W Mgmt., Inc., 86 B.R. 1, 2 (D.D.C. 1988). Rule 5004(a) of the Bankruptcy Rules states: "A bankruptcy judge shall be governed by 28 U.S.C. § 455." The Court, therefore, will analyze Austin's motion under section 455.

A. Standard for Disqualification Under Section 455

Section 455 of Title 28 states, in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might

> reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C. § 455 (1988). The purpose of section 455(a) "is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 865 (1988). "Under [section 455(a)], a judge must recuse himself in circumstances that give rise to a reasonable inference of impropriety or lack of partiality." United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam) (citing Liljeberg, 486 U.S. at 865). Thus, "[t]he standard under section 455(a) is an objective one: 'The test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (quoting Parker v. Conners Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); see United States v. Kelly, 888 F.2d 732, 744-45 (11th Cir. 1989). As a general rule, "a judge's rulings in the same or a related case may

not serve as a basis for a recusal motion." McWhorter, 906 F.2d at 678; see United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136 (1982). "It is well-established that an allegation of bias sufficient to require disqualification under . . . section 455 must demonstrate that the alleged bias is personal as opposed to judicial in nature." United States v. Meester, 762 F.2d 867, 884 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); see First Alabama Bank v. Parsons Steel, Inc., 825 F.2d 1475, 1487 (11th Cir. 1987), cert. denied, 484 U.S. 1060 (1988). But "[a]n exception to this general rule occurs when the movant demonstrates 'pervasive bias and prejudice.'" McWhorter, 906 F.2d at 678 (citations omitted).

Demonstrating personal bias or prejudice is not easy. "A judge should not recuse himself based upon unsupported, irrational, or tenuous allegations." Giles v. Garwood, 853 F.2d 876, 878 (11th Cir. 1988) (per curiam), cert. denied, 489 U.S. 1030 (1989). "[A] charge of partiality must be supported by facts." United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) (per curiam). Not all "facts" are created equal, however: "Section 455 does not require the judge to accept all allegations by the moving party as true. If a party could force recusal of a judge by factual allegations, the result would be a virtual 'open season' for recusal." Greenough, 782 F.2d at 1558 (citing Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1019 n.6 (5th Cir. Unit A Feb.

1981), cert. denied, 456 U.S. 960 (1982)). For example, "[a]ffidavits [of prejudice] based on conclusion, opinions, and rumors are an insufficient basis for recusal." Davis v. Comm'r, 734 F.2d 1302, 1303 (8th Cir. 1984); see Glass v. Pfeffer, 849 F.2d 1261, 1267 (lOth Cir. 1988); Fowler v. United States, 699 F. Supp. 925, 929 (M.D. Ga. 1988).

B . Austin's Allegations

Austin's lengthy motion also doubles as an affidavit. Appended to the motion is a sworn averment, signed by Austin, that every single allegation of fact in the motion is true. Signet vehemently contests the verity of these facts, arguing that "[t]he 'facts' are merely Austin's unsupported conclusory statements, assumptions and beliefs based on conjecture and speculation.

Austin has offered no actual evidence of facts which would either constitute a reasonable basis for questioning Judge Dalis's impartiality or establishing other disqualifying circumstances."[3] The Court has reviewed Austin's brief carefully, and concludes that all of his allegations of fact fall into one of three categories. The first category is conclusions and opinions. An example of an allegation falling into this category is his paragraph number 23. It states, in pertinent part: "From the beginning of the

[3]Signet Brief at 6-7.

assignment of debtor's cases to Judge Dalis he [Judge Dalis] knew that Signet got information by means of a fraudulent promise . . . ."[4] Austin has simply "concluded" that Signet got the subject information via fraud, and opined that Judge Dalis "knew" this. The second category is exceptions Austin has to rulings made by Judge Dalis during the various proceedings in the related bankruptcy cases. For example, in paragraph 49, Austin states: "Judge Dalis, in his order putting the parties into Chapter 7, had quoted Mr. Miles, the perjurer."[5] Another example is contained in paragraph 53:

> Later, months after the 31, 1989 [sic], Judge Dalis dismissed without prejudice the motions and responses heard at that hearing. This order of dismissal ignored the fraud and the perjury, but debtors thought he would do something to correct and stop the ongoing wrongs. Debtors later came to believe that he made a conscious decision to ignore the fraud and perjury and to continue ruling against the debtors as thought the original testimony was true. Factually, in later orders, he quoted Mr. Miles' false and fraudulent figures as though he was never aware of the falsified testimony.[6]

The above-quoted examples are some of the tamer accusations made in the motion. The third category is background facts that have no bearing on the Court's analysis.

Those facts that fall into the first category, as mentioned above, are insufficient to require disqualification. E.g., Davis

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[4]Austin Motion at 9.

[5]Id. at 18.

[6]Id. at 19-20.

734 F.2d at 1303; Glass, 849 F.2d at 1267. Apart from Austin's self-serving averments of wrongdoing on the part Signet, its attorneys and witnesses, and Judge Dalis, Austin offers no evidence whatsoever that Judge Dalis has engaged in any wrongdoing, or that he is personally biased or prejudiced against Austin. The "evidence" presented by Austin is woefully insufficient to raise any doubts as to Judge Dalis' impartiality, let alone a "significant" one. See McWhorter, 906 F.2d at 678.

Nor do the allegations that fall into the second category show "pervasive bias and prejudice" in Judge Dalis's rulings. Even if the Court were to assume, as Austin implies, that Judge Dalis rarely rules in Austin's favor, "the statistical one-sidedness of [a] court's evidentiary, factual, and legal rulings simply cannot be used to support an inference of bias." Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 995 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985). Even "[t]otal rejection of an opposed view cannot itself impugn the integrity or competence of a trier of fact." NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949); see Huff v. Standard Life Ins. Co., 683 F.2d 1363, 1369 (11th Cir. 1982) ("numerous" adverse rulings and "off-handed statements by the Court in a completely judicial context" insufficient to disqualify). The Eleventh Circuit recently stated:

"Reassignment may be appropriate, for example, if a judge

> conducts a trial in a manner that creates the appearance that he is or may be unable to perform his role in an unbiased manner, or if the judge has demonstrated that he is unwilling to carry out the law in a particular case.

Torkington, 874 F.2d at 1446 (citations omitted). Nothing in the record (except Austin's self-serving, conclusory allegations) indicates that either situation has occurred in this case. Although Austin has offered to submit "evidence" that Judge Dalis has joined in the alleged acts of fraud, the Court, pursuant to its order of August 6, 1990, refused to allow these materials to be filed in support of his motion because they merely duplicate materials already before the Court. In addition, the Court notes that virtually all of the misdeeds Austin seeks to attribute to Judge Dalis by way of this "evidence" concern Judge Dalis's rulings and findings in these proceedings. Thus, even if the Court did allow Austin to bury the Court with his "evidence," the proffered materials would have been insufficient to raise any inference of bias. See Pittsburgh Steamship, 337 U.S. at 659; Southern Pacific, 740 F.2d at 995. Austin has failed to demonstrate that Judge Dalis should be disqualified.

C. Timeliness

Signet also argues that Austin's disqualification motion was not timely filed. The Court agrees, and, apart from the motion's lack of merit, denies the motion on this ground as well. "Section

455 relates to recusal based on circumstances existing prior to or at the time of the judge's participation in a case." Torkington, 874 F.2d at 1446. Therefore, "[a] motion to disqualify . . . under section 455(a) must be timely." United States v. Slay, 714 F.2d 1093, 1094 (11th Cir. 1983) (citation omitted), cert. denied, 464 U.S. 1050 (1984). Where a movant is aware of the alleged facts that he contends support a section 455 motion well before the motion is filed, yet he does not move for recusal until after the judge decides some matter adversely to him, then the motion is not timely. Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987); Singer v. Wadman, 745 F.2d 606, 608 (lOth Cir. 1984), cert. denied, 470 U.S. 1028 (1985); Fowler, 699 F. Supp. at 926. The Court cannot find one allegation of wrongdoing or bias concerning Judge Dalis that is recent enough to render Austin's motion timely. All of the events of which Austin complains occurred several months to several years before Austin filed his motion. Austin does not address the timeliness issue directly. He suggests, however, that he thought Judge Dalis eventually see things his way, but when that did not occur, Austin concluded that Judge Dalis must be biased. As previously discussed, however, that Judge Dalis's rulings continued to go against Austin cannot be the basis of a recusal motion. This reason therefore does not excuse the timely filing requirement.

D. Sanctions

The Court is deeply concerned about the tactics Austin has employed with increasing frequency in these related cases in this Court. Accordingly, the Court has warned Austin that, unless his tactics and unprofessional behavior change, he will be subject to sanctions under applicable rules and statutes. Indeed, the Court has enjoined Austin from filing pleadings in this Court without first obtaining leave of the Court to do so. Order, Nos. CV 490-122, -123, -165, -194, -210, and -211 (S.D. Ga. Aug. 6, 1990); see generally Procup v. Strickland, 792 F.2d 1069, 1073-74 (11th Cir. 1986) (en banc); Urban v. United Nations, 768 F.2d 1497, 1499-1500 (D.C. Cir. 1985). This motion, however, has done precisely the kind of damage the Court hoped to prevent, and shows that Austin's tactics continue unabated in the bankruptcy court. The motion is patently meritless, and has resulted in yet another substantial delay in the bankruptcy proceedings. Austin's "brief" in this matter shows that he has done absolutely no research on the law that governs the present motion, and his accusations against Judge Dalis have no basis in fact whatsoever. The Court cannot ever recall having seen pleadings--even from Austin--of such abysmal quality and interposed for such vexatious and dilatory purposes. The leniency normally accorded to a pro se layperson litigant need not be extended to an attorney who represents himself.

Although Rule 11 of the Federal Rules of Civil Procedure is inapplicable to bankruptcy appeals and proceedings in the district

court, 28 U.S.C. § 1927 (1988) does apply to such proceedings. See In re Akros Installations Inc., 834 F.2d 1526, 1531 (9th Cir. 1987). The Court has warned Austin several times that his tactics have exceeded the bounds of the law, and that further violations will merit sanctions. That time has come. The Court orders Austin "to satisfy personally the excess costs, expenses, and attorney's fees reasonable incurred because of [his] conduct" in pursuing this motion. See 28 U.S.C. § 1927; Lisa v. Fournier Marine Corp., 866 F.2d 530, 532 (1st Cir. 1989) (per curiam) (where appellant does little more than list the many wrongs he believes occurred in the trial court, the pleading lacks meaningful argument, rendering appeal frivolous and sanctionable under section 1927); cf. Thomas v. Evans, 880 F.2d 1235, 1243 (11th Cir. 1989) (excessive filing of pleadings alone "may be evidence that pleadings have been filed for an improper purpose" under rule 11). To facilitate calculation of this amount, Signet shall submit detailed evidence of these costs, expenses, and fees within ten days of the date of this order. In the matter of attorney's fees, the Court prefers inclusion of evidence in the form of contemporaneous time records. See Webb v. Board of Educ., 471 U.S. 234, 238 n.6 (1985).

The Court also orders, pursuant to Section IV, Rule 5(a) of the Local Rules of the Southern District of Georgia, its own inherent power, and its supervisory power over the bankruptcy court, that Austin show cause why he should not be suspended from membership to

the bar of this Court until these cases are completed. See, e.g., In re Snyder, 472 U.S. 634, 643 (1985) (federal courts have inherent power to suspend or disbar

attorneys); In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990) (same). This Court, as mentioned above, has repeatedly put Mr. Austin on notice that his unprofessional conduct in these matters is unacceptable. See Finkelstein, 901 F.2d at 1564. He has nevertheless persisted in conducting himself and this litigation in just such a manner. Austin has so multiplied the proceedings in these cases that the Court believes that suspension of Austin will expedite resolution of these cases more effectively than any other sanction. To date, in fact, no sanction or threatened sanction has had any impact on his behavior before this Court or the bankruptcy court. Unless Austin can show the Court a valid reason justifying his conduct as an attorney in these proceedings, the Court will order him suspended from the practice of law before this Court and the bankruptcy court of this district until these related cases are resolved. Of course, if Austin is removed, he may arrange for other counsel to represent him, Diamond, and Rose in proceedings that he personally, or as principal of Diamond and Rose, wishes to pursue. The Court understands that bankruptcy exacts an emotional toll on a debtor. That, however, is no excuse to exhibit persistent, total disregard for the rules of court and the required standards of professionalism. See id. (a court considering

suspension must "hold attorneys accountable to recognized standards of professional conduct"). The Clerk of Court shall notify Austin when the show cause hearing will take place.

CONCLUSION

The Court has determined that Austin's motion for recusal is baseless and untimely filed. Accordingly, the Court **DENIES** it. Additionally, the Court determines that, given the extraordinary nature of Austin's conduct in these related bankruptcy actions, it should exercise its inherent power to govern the conduct of attorneys that practice before the Court, and its supervisory power over bankruptcy proceedings, to determine whether the interests of all involved--including Austin, Diamond, and Rose--would be better served by suspending Austin from membership in the bar of this Court until these related bankruptcy proceedings are at an end. Because of the baselessness, and vexatious and dilatory character of this motion, and in light of prior warnings that this Court has given him, the Court also orders that Austin reimburse Signet for costs, expenses, and attorney's fees incurred as a result of having to defend against this motion. Finally, the Court orders Signet to submit evidence of these costs, expenses, and attorney's fees within ten days of this order.

SO ORDERED this 3rd day of May 1991.

B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA